

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

PHARMASTEM THERAPEUTICS, INC., a  
Delaware corporation,

Plaintiff,

v.

VIACELL, INC., a Delaware corporation,  
OBSTETRICAL AND GYNECOLOGICAL  
ASSOCIATES, P.A., FEMPARTNERS, INC., a  
Delaware corporation and CARITAS ST.  
ELIZABETH'S MEDICAL CENTER OF  
BOSTON, INC., a Massachusetts Nonprofit  
Corporation,

Defendants.

Civil Action No. 04-CV-11673 RWZ

**EXHIBIT 3**

**TO**

**DECLARATION OF ATTORNEY EDWARD W. LITTLE, JR.**

IN THE UNITED STATES DISTRICT COURT  
IN AND FOR THE DISTRICT OF DELAWARE

PHARMASTEM THERAPEUTICS, INC.,

Plaintiff

v.

VIACELL, INC., et al.,

Defendants

: CIVIL ACTION

: NO. 02-148 (GMS)

Wilmington, Delaware  
Friday, August 6, 2004  
11:35 o'clock, a.m.  
\*\*\*Telephone conference

BEFORE: HONORABLE GREGORY M. SLEET, U.S.D.C.J.

APPEARANCES:

POTTER, ANDERSON & CORROON  
BY: PHILIP A. ROVNER, ESQ.

-and-

PERKINS COIE, LLP  
BY: PAUL J. ANDRE, ESQ. and  
LISA KOBIALKA, ESQ.  
(Menlo Park, California)

Counsel for Plaintiff

Valerie J. Gunning  
Official Court Reporter

## 1 APPEARANCES (Continued):

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2 RICHARDS, LAYTON & FINGER  
3 BY: JEFFREY L. MOYER, ESQ.

4 -and-

5 GOODWIN PROCTER, LLP  
6 BY: JOHN C. ENGLANDER, ESQ.,  
7 JAMES MCGARRY, ESQ. and  
8 ELAINE BLAZE, ESQ.  
(Boston, Massachusetts)

9 Counsel for ViaCell, Inc.

10 MORRIS, JAMES, HITCHENS & WILLIAMS, LLP  
11 BY: RICHARD K. KIRK, ESQ.

12 -and-

13 PILLSBURY WINTHRIP, LLP  
14 BY: WILLIAM F. ABRAMS, ESQ.  
(San Diego, California)

15 Counsel for CBR Systems, Inc.,  
16 f/k/a Cord Blood Registry, Inc.

17 DILWORTH PAXSON, LLP  
18 BY: JAMES F. RODGERS, ESQ.  
(Philadelphia, Pennsylvania)

19 Counsel for CorCell, Inc., Cryo-Cell and  
20 BirthCells

21 - - -

1 morning.

2 MR. KIRK: And Bill Abrams from Pillsbury  
3 Winthrop, also for CBR.

4 Am I missing any on the defense side?

5 MR. MCGARRY: Jim McGarry and Elaine Blaze from  
6 Goodwin Procter.

7 THE COURT: Good morning, all.

8 For the plaintiff.

9 MR. ROVNER: Good morning, your Honor. This is  
10 Phil Rovner from Potter Anderson on behalf of PharmaStem, and  
11 with me on the line is Paul Andre and Lisa Kobialka from  
12 Perkins Coie.

13 THE COURT: Good morning.

14 MR. ANDRE: Good morning, your Honor.

15 THE COURT: All right. Well, thanks for getting  
16 together on such short notice.

17 As we all know, the defendants have collectively  
18 moved the Court for an expedited briefing schedule and  
19 hearing wherein they seek to obtain an order finding the  
20 plaintiff in contempt of the Court's July 2 order.

21 Who's going to address this for the defendants?

22 MR. ENGLANDER: I am, your Honor. John  
23 Englander.

24 THE COURT: Okay. Mr. Englander?

25 MR. ENGLANDER: Do you want me to just go?

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## 1 PROCEEDINGS

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2 (REPORTER'S NOTE: The following telephone  
3 conference was held in chambers, beginning at 11:35 a.m.)

4 THE COURT: Good morning.

5 MR. KIRK: Good morning, your Honor.

6 THE COURT: Counsel, is that you, Mr. Kirk? Do I  
7 recognize your voice?

8 MR. KIRK: It is, your Honor.

9 THE COURT: Do you want to start with  
10 introductions?

11 MR. KIRK: I will be happy to start with  
12 introductions from the defense side, your Honor.

13 THE COURT: All right.

14 MR. KIRK: This is Dick Kirk from Morris James  
15 for defendant CBR.

16 With me on the line I think in Delaware is  
17 Jeff Moyer from Richards Layton, for ViaCell. Also on  
18 the line are John Englander from Goodwin Procter for  
19 ViaCell, Jim Rodgers from Dilworth Paxson for CorCell and  
20 Cryo-Cell.

21 Is Bill Abrams on the phone yet?

22 MR. ABRAMS: I am. I'm on the line. Good

1 THE COURT: Let's go.

2 MR. ENGLANDER: Okay. Your Honor, briefly, we  
3 should start with the July 2nd order that we believe was  
4 violated.

5 The context of that order was a letter sent out  
6 on June 1st or thereabouts by PharmaStem, disseminated to  
7 25,000 obstetricians.

8 That letter contained many false statements.

9 Among them, one that we highlighted was an actual statement  
10 that the Court had ruled with respect to obstetrician  
11 liability.

12 The letter had an immediate and substantial  
13 impact on the industry. Essentially, turmoil. We had  
14 obstetricians refusing to collect. We had people who were  
15 being -- who were giving birth and then found that they were  
16 not going to get collected.

17 And in our view, your Honor, was that this was  
18 PharmaStem's effort to essentially pressure the defendant  
19 through the obstetricians, because the obstetricians would  
20 then refuse to do business with us, to take a license, and  
21 preempt the post-trial process that we're in.

22 The Court entered an order finding that the  
23 June 1 letter was false. That order set out particularly  
24 limitations on contributory infringement that had been  
25 omitted from statements in the letter. And it concluded with

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1 an order that there would be no more false or misleading  
2 statements to obstetricians.

3 PharmaStem sought to vacate that order and also  
4 specifically address parts of that order in its motion and  
5 the Court did not vacate the order.

6 What we're seeking, your Honor, is really to  
7 avoid having PharmaStem distribute yet another misleading  
8 letter to the obstetricians. Essentially, to preserve the  
9 status quo while your Honor is considering the post-trial  
10 motions from trial.

11 And that's our principal concern. At this point,  
12 the letter that, the August 2nd letter that's the subject of  
13 this motion has been posted on PharmaStem's website. We do  
14 not know if they have also made a mailing like they did last  
15 time, why they're distributing it to virtually all the  
16 obstetricians in the country.

17 We believe that the August 2nd letter is  
18 misleading. I will start by saying that it is not as  
19 directly false as the June 1 letter was. But we believe the  
20 paragraph that we've highlighted is intended to and does say  
21 to obstetricians something that is very misleading, which is  
22 that they can be liable simply for the collection of  
23 umbilical cord blood.

24 And the paragraph that we've highlighted  
25 in the August 2nd letter is in many ways very, very

1 similar to language that we also highlighted in the June 1  
2 letter.

3 The letter essentially says, the paragraph that  
4 we've highlighted essentially says that if you're an  
5 obstetrician, you need a license to quote collect cord blood  
6 or collect -- for the collection of umbilical cord blood, and  
7 then couples that with a statement above it to the effect  
8 that if you don't have such a license, you will be sued or  
9 you are subject to being sued.

10 Your Honor, we submit that those statements  
11 are misleading, and they are misleading in ways that  
12 were directly anticipated by the Court's July 2nd order  
13 in the sense that, now, the prior briefing indicated  
14 that obstetricians cannot be liable under these method  
15 claims for contributory infringement simply for collection.  
16 At least they need to sell or offer to sell, at the very  
17 least.

18 And also that they, the obstetricians,  
19 it's -- the Court's order says that they can't be liable if  
20 all they're doing is selling a service. None of those  
21 limitations are suggested in here, indicated in here,  
22 reflected in here, in this August 2nd letter. Its intent and  
23 purpose is, once again, to put the obstetricians in fear that  
24 simply collecting is sufficient, and in light of the briefing  
25 and the Court's order, we believe that that is misleading and

1 a violation of the Court's order.

2 Essentially, your Honor, the point comes down to  
3 this, which is PharmaStem is misusing its patents by claiming  
4 threats that's not there and that the Court's orders at trial  
5 indicated is not there, in order to exert improper leverage  
6 on the defendants.

7 And what we're seeking is an order preventing  
8 those, the dissemination of that kind of false statement.

9 THE COURT: Okay. Who's going to respond for  
10 PharmaStem?

11 MR. ANDRE: Your Honor, this is Paul Andre.

12 THE COURT: Okay.

13 MR. ANDRE: I will respond.

14 I'm a little confused because Mr. Englander just  
15 ended with saying that it's a false statement, but earlier he  
16 said it's not a false statement.

17 So let me just address --

18 THE COURT: Well, I think he perhaps misspoke.  
19 He did start out by indicating that he didn't believe that  
20 the 8/2 statements of which he complains are as false as  
21 those in the June 1 letter, but did go on to argue  
22 essentially that they are misleading.

23 MR. ANDRE: Let me give you a little bit of  
24 background --

25 THE COURT: Okay.

1 MR. ANDRE: -- relating to the new laws, your  
2 Honor.

3 There are several patents that issued during the  
4 pendency of the cases in front of this Court. Some of them  
5 issued very late in the case and we did not add them into our  
6 litigation against ViaCell and the other defendants at that  
7 time because of the late nature of when they issued.

8 We have initiated several lawsuits around the  
9 country, suing obstetricians against these two new patents  
10 that were never before the Court here in Delaware.

11 In those complaints, we have alleged that  
12 obstetricians either, they infringe, inducing infringement or  
13 contributory infringement one or more of these patents.

14 We have sued numerous obstetricians on this. We  
15 believe it's something that a legal, viable theory and we  
16 intend on pursuing these litigations. There's nothing  
17 misleading about the statement where it says, quite frankly,  
18 that we have initiated lawsuits against obstetricians with  
19 these patents and that our license agreement provide license  
20 to obstetricians that license with cord blood banks. That's  
21 all true.

22 It's not -- Mr. Englander said we did not put  
23 forward the elements of contributory infringement. We're not  
24 certain we're going after contributory infringement or the  
25 obstetricians, to be quite frank.

1 I don't want to give up our legal theory, but we  
2 do have issues of inducement to infringe as well.  
3 So it is something that --  
4 THE COURT: Let me ask you this, Mr. Andre: Do  
5 you believe that it's possible that in light of the June 1  
6 mailing taken together, the August 2 posting -- by the way,  
7 was this a mailing as well as a posting on the website?

8 MR. ANDRE: I believe it was, your Honor, yes.

9 THE COURT: Okay. Was the 8/2 mailing to the  
10 same physicians who received the 6/1 mailing, that is the  
11 category of physicians known as obstetricians?

12 MR. ANDRE: I believe that it was, your Honor. I  
13 don't know. We were obviously not involved in this. The  
14 mailing service does this type of work for companies.

15 THE COURT: Okay. Would you concede the  
16 possibility, if not the likelihood, that the combination of  
17 the two mailings, if not one and/or the other alone, standing  
18 alone, might have a chilling effect on the practice insofar  
19 as it involves the collection of cord blood by these  
20 physicians?

21 MR. ANDRE: I would think not because we have 15  
22 other companies that are licensing and that we have -- that  
23 have made inroads throughout the nation and can facilitate  
24 the collection of cord blood.

25 THE COURT: So you think they would merely turn

1 to those other companies?

2 MR. ANDRE: Absolutely.

3 THE COURT: Okay. Go ahead. I'm sorry I  
4 interrupted.

5 MR. ANDRE: That's quite all right.

6 And I guess what would be important is to take a  
7 step back. What really prompted the June 1st mailing, which  
8 was sent out by Mr. Didier, and we will concede that there  
9 are perhaps a single word or two that could have been  
10 clearer, but, you know, he gave his understanding as a  
11 layperson, not as a lawyer, obviously.

12 But what had happened, after we had obtained this  
13 jury verdict, the defendants in this case have been telling  
14 all (inaudible), we've got numerous, I mean dozens and dozens  
15 reports of this that the Court would not sustain this jury  
16 verdict and that there was no need to worry.

17 So we actually wanted to put people on notice,  
18 obstetricians and others, that these patents are -- have not  
19 been overturned and that we intend to enforce them.

20 THE COURT: So you're saying, your mailing, your  
21 June 1 mailing, at least, was a reaction to a campaign by --  
22 well, you did not use that word, I'm using it, but at least  
23 statements by the defendants that the Court would not sustain  
24 the verdict?

25 MR. ANDRE: That's correct. And so the June 1st

1 mailing went out.

2 I don't know if you notice in the letter we sent  
3 to the Court yesterday, if you look at the amazing increase  
4 in revenues and business that has resulted, it is pretty  
5 astounding when you see the companies have increased their  
6 growth rate of 83 percent in light of CBR, they have the  
7 finding of willful infringement against them.

8 So they have been very aggressive in continuing  
9 their marketing activities, telling all obstetricians and  
10 anyone else who would listen, even pressuring our eventual  
11 licensees not to take a license.

12 We have now licensed the entire industry but with  
13 the exception of these defendants that we've sued in this new  
14 realm of lawsuits.

15 And the June 1st letter went out. Where it said  
16 the Court ruled, it should have been the jury found that  
17 infringement occurs. That's a layperson's misunderstanding  
18 more than anything else.

19 This new press release that was released on the  
20 2nd is nothing -- is not unsimilar to any other press release  
21 we've put out. We had a, since the trial last November,  
22 October, November, we had another lawsuit in the Northern  
23 District of California where we named five cord blood banks  
24 releasing exactly a press release that's almost identical to  
25 what's in here. Those five cord blood banks have taken

1 licenses. We've dismissed that case. We're going through  
2 another round.

3 This is almost identical to what has been put  
4 forward previously. The only difference in this particular  
5 case, we are suing obstetricians.

6 And it's something that they find problematic is  
7 a quote from Mr. Didier saying that we prefer not to sue  
8 obstetricians. That's not something we would prefer. We  
9 prefer not to do that, but we have to protect our  
10 intellectual property.

11 And then informing them there are licenses, they  
12 are spelled out in the contracts, that if the obstetricians  
13 have a license, pass through license to any other  
14 obstetrician who uses a cord blood bank.

15 So it it does not have a chilling effect  
16 whatsoever. If you look at their growth rates, it's just the  
17 opposite.

18 THE COURT: Okay. Mr. Englander?

19 MR. ROVNER: Your Honor, this is Phil Rovner.

20 Before Mr. Englander speaks, can I just  
21 address one of the procedural issues that occurred  
22 during the defendants' first motion practice on this issue  
23 on June 30?

24 THE COURT: I'm not interested in talking about  
25 procedure, Mr. Rovner, dating back to the -- does it have

1 relevance to the substance -- substantive issues we're  
2 talking about right now?

3 MR. ROVNER: Mr. Englander mentioned that we had  
4 moved to vacate the order and that your Honor didn't grant  
5 it. That motion, as far as we understand it, is still  
6 pending.

7 THE COURT: That motion will remain pending, Mr.  
8 Rovner, until I address it. You're right. That's correct.  
9 But what does that add to the discussion of the substance is  
10 my query to you.

11 MR. ROVNER: Well, it --

12 THE COURT: I mean, you're right, it corrects Mr.  
13 Englander's statements. You're right about that. That  
14 motion is still before the Court.

15 MR. ROVNER: Okay. Well, I just wanted that to  
16 be clear because they moved for a TRO as well as a  
17 preliminary injunction, and the TRO was granted by your Honor  
18 as well as the preliminary injunction, but prior to the time  
19 that we had an opportunity to respond. And that is now fully  
20 briefed.

21 THE COURT: I'm aware of these things, Mr.  
22 Rovner.

23 MR. ROVNER: Okay.

24 THE COURT: Again, is there a reason that you  
25 felt it necessary to bring that to my attention right this

1 moment?

2 MR. ROVNER: I just wanted the record to reflect  
3 what the procedural --

4 THE COURT: Mr. Englander, would you please reply  
5 to Mr. Andre's substantive comments?

6 MR. ENGLANDER: I will, your Honor.

7 I think what I said was that these statement in  
8 the August 2 letter are not as directly false. They are, we  
9 believe, misleading on their own.

10 I think as well the Court's comment that in  
11 combination with the prior letter, there is real misleading  
12 effect here is right.

13 You know, there was a prior letter to these  
14 25,000 people and now we hear those same people are getting  
15 this additional letter that's simply going to compound what  
16 they've already heard, which, you know, to the effect that  
17 the Court has ruled with respect to obstetrician liability  
18 and without any reference to the limitations on obstetrician  
19 liability.

20 Now, Mr. Andre says that there hasn't been any  
21 chilling effect from those letters. Your Honor, I think the  
22 record was replete in our last filing as to the effect of the  
23 letters and it was immediate and it was very significant.

24 The Court Order of July 2nd allowed us with  
25 respect to those people who contacted us to blunt the effect

1 of that letter. But we don't know how many thousands of  
2 obstetricians are worried, are concerned. We know there were  
3 many who immediately responded, including major practices who  
4 started refusing to collect.

5 This letter is going to compound that. That's  
6 why we're here, your Honor, because there's a very  
7 significant concern on the part of all defendants, based on  
8 the track record that this letter, which we now learned has  
9 been sent out, is going to cause significant, immediate  
10 irreparable harm, both to us and to people whose collections  
11 are at issue.

12 Mr. Andre suggests that all that's going to  
13 happen is these people will go to the other licensees. I  
14 don't know where that comes from. There's certainly no  
15 evidence that that is happening in major part.

16 My understanding is the four defendants  
17 before the Court still represent roughly 80 percent of  
18 the market here. So I don't think that it's, you know,  
19 glibly saying, which, of course, is their intent, that  
20 these people will just go to the competition. That  
21 wasn't what happened last time and there's no evidence  
22 that that is going to happen.

23 Mr. Andre commented that the patent that the  
24 obstetricians have been sued on is not the same as the '553.  
25 Your Honor, the '427 patent, which we attached,

1 has essentially the same claims as the '553. And in fact,  
2 there was litigation over this patent before you in advance  
3 of trial because they wanted to talk about it as evidence.  
4 And during that litigation, Mr. Andre represented to the  
5 Court that the '427 claims were essentially the same as the  
6 '553 claims and handed up a chart to that effect. I believe  
7 it's in the transcript.

8 The last thing I want to talk about, Mr. Andre  
9 indicated that the June 1 letter was a response to the  
10 defendants telling people that the Court would not sustain  
11 the verdict.

12 Again, there's no evidence in the record, and  
13 they filed a very lengthy response back in July about this,  
14 no evidence that that is why they sent their letter, that the  
15 defendants were saying that. And I can say on behalf of  
16 ViaCell, ViaCell has filed an S1 in the meantime and I  
17 believe the S1 is pretty accurate in saying what the risks  
18 are with respect to the jury verdict and what may come of  
19 that jury verdict.

20 So this may have happened, but certainly this  
21 is the first time that this excuse has been offered by the  
22 plaintiff for the nature of the correspondence that they've  
23 directed at the obstetricians.

24 THE COURT: Mr. Andre?

25 MR. ANDRE: Yes. I guess what Mr. Englander and

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1 the defendants are complaining about is that the -- this  
2 press release, the August 2nd press release has a potential  
3 of giving obstetricians the notification that they may be  
4 held liable for collecting cord blood banks from unlicensed  
5 cord blood -- collecting cord blood for unlicensed cord blood  
6 banks.

7 And that is exactly true. We are suing  
8 obstetricians for doing exactly that. There is a potential  
9 of liability. That's not misleading; that is an absolute  
10 truth.

11 We are going to continue to find obstetricians  
12 who collect for unlicensed cord blood banks and sue them.  
13 And we have not only a right, we have an obligation to put  
14 people on notice of these patents, because if you don't give  
15 them proper notice and the idea there might be potential  
16 liability, you cannot expect them to stop their behavior.  
17 And that's an obligation of a patentee.

18 Now, Mr. Englander said the Court has not ruled  
19 regarding obstetrician liability. That's correct. We did  
20 not bring that forward in the Court in Delaware. We will be  
21 bringing that forward in the five courts in which we filed  
22 these lawsuits. It is a very real possibility, and from our  
23 point of view, a very real probability that obstetricians  
24 will be held liable for patent infringement, asserting one of  
25 the theories of patent infringement that I talked about

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1 earlier.

2 With respect to the '427 patent that Mr.  
3 Englander mentioned, I did bring it to the Court's attention,  
4 brought one single claim to the Court's attention.

5 There are numerous claims in this patent and  
6 claims that are -- that were not before the Court in  
7 Delaware, claims we intend on pursuing in the new cases, and  
8 that are substantially different than the cases that have  
9 been tried already, and would need further claim construction  
10 to boot.

11 So the fact that there is a single similar claim  
12 that led to this patent having a terminal disclaimer to the  
13 '553 to avoid any type of double-patenting issues is  
14 irrelevant to the fact that we have a new lawsuit with new  
15 defendants and new claims that we will be pursuing.

16 So to say that this press release that went out  
17 on August 2nd is misleading is incorrect. It's not  
18 misleading. It's telling the absolute truth. It is  
19 conveying a message, obstetricians can be sued for patent  
20 infringement, and they have been, and they will continue  
21 being sued for patent infringement if we find out about them  
22 infringing our patent.

23 THE COURT: Mr. --

24 MR. ANDRE: I don't know how else to notify  
25 obstetricians about these patents pursuant to our duty as

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1 patentee and I don't know how, you know, how we can make this  
2 press release, you know, informing the public about these new  
3 lawsuits any more benign.

4 There's nothing in the statement even that Mr.  
5 Englander read, the paragraph they highlighted. I don't know  
6 if it's in front of the Court?

7 THE COURT: Yes, it is.

8 MR. ANDRE: I don't know how that can be made any  
9 more benign or any more correct than it is.

10 THE COURT: Mr. Englander, you do, at Page 7 of  
11 your memorandum, point out that you, the defendants  
12 collectively, do not complain about the announcement of these  
13 lawsuits. And Mr. Andre points out in his recent remarks  
14 that they are, in point of fact, they have initiated lawsuits  
15 against obstetricians on a theory.

16 I'm not sure what the theory is. I'm not sure  
17 that I need to know at this point. But that that is merely a  
18 statement of fact, and you don't complain about the fact of  
19 the announcement of the lawsuits. Why, then, do you complain  
20 of obstetricians, suits against obstetricians and others?  
21 What is it that you complain -- go ahead.

22 MR. ENGLANDER: Your Honor, I think that the  
23 reason that we are not complaining here about the  
24 announcement of the lawsuits is because our understanding of  
25 the law is that they can announce the existence of a lawsuit

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1 provided they do so in good faith.

2 But, your Honor, what we're trying to focus on  
3 is a paragraph below the two paragraphs that talk about the  
4 lawsuit.

5 THE COURT: I understand that. The language  
6 that's in quotes. While we would prefer not to sue.

7 MR. ENGLANDER: And I think, if I could, because  
8 I think that, you know, we don't think they can assert a  
9 lawsuit against an obstetrician in good faith, your Honor,  
10 especially based on what has gone on in your courtroom and  
11 rulings that you made with respect to jury instructions. But  
12 Mr. Andre says differently and we understand that that is not  
13 what the Court wants to rule on.

14 THE COURT: Right. And that issue has not been  
15 teed up for me.

16 MR. ENGLANDER: Right. And what we're focusing  
17 on is really what I perceive, I think, as thumbing their nose  
18 at the Court Order in this sense: The one thing that we made  
19 clear in our documents previously was that their letter of  
20 June 1 suggests that obstetricians can be liable simply for  
21 collecting cord blood and that that is inaccurate.

22 THE COURT: And that's one of the reasons that  
23 caused me to sign and issue the order.

24 MR. ENGLANDER: And they are saying the same  
25 thing in that paragraph. They're saying it very craftily,

1 but they are saying the same thing because they talk about  
2 getting a license for the collection of umbilical cord blood  
3 and they do it without reference to the limitations which  
4 your Honor is well aware of and which are in that Order and  
5 which they are well aware of.

6 And Mr. Andre says I don't know how I could have  
7 done this any more benignly. Well, how about telling the  
8 truth? How about being accurate? How about reflecting to  
9 the world that there is at least a disagreement as to whether  
10 obstetricians can be liable for the collection of umbilical  
11 cord blood? That there are limitations on contributory  
12 infringement?

13 There's no doubt that there is no direct  
14 liability for patent infringement under the '427 or the  
15 '553. Obstetricians simply do not perform all the steps of  
16 any of those, and I don't think Mr. Andre is suggesting  
17 that.

18 So there are only two other theories on  
19 which they could be liable: Contributory infringement  
20 and now Mr. Andre is suggesting inducing infringement  
21 for the first time, your Honor. We heard it today for the  
22 first time.

23 As to contributory infringement, we've been over  
24 and over this. Your Honor has been over it and your Honor  
25 has indicated what your views on it. And for them to leave

1 that out, especially in light of the order, we think is  
2 misleading. We think it's in contempt.

3 The suggestion that they get around it because  
4 some obstetrician somewhere might have been involved in  
5 inducing infringement I think is a very weak argument, your  
6 Honor.

7 THE COURT: Okay.

8 MR. ENGLANDER: If they wanted to make this  
9 accurate, they could have. But they didn't, because what  
10 they want to do is leave the obstetricians, the general  
11 25,000 obstetricians not familiar with the litigation before  
12 your court in fear that they will be liable simply for  
13 collecting cord blood.

14 THE COURT: Mr. Andre?

15 MR. ANDRE: Your Honor, once again, Mr.  
16 Englander -- I don't see where he's pointing to in the press  
17 release because I mean that is the issue here.

18 THE COURT: Well, look at -- I think if you --

19 MR. ENGLANDER: It's the last sentence of the  
20 third paragraph coupled with the reference in the first  
21 phrase to the fact that we would prefer not to sue.

22 MR. ANDRE: Yes. PharmaStem's license agreements  
23 provide a license to obstetricians and health care providers  
24 for the collection of umbilical cord blood provided they work  
25 with licensed banks. That's a true statement.

1 MR. ENGLANDER: I actually think it's probably  
2 inaccurate, the license for the collection of umbilical cord  
3 blood.

4 Getting past that, standing alone, even if it's  
5 accurate, our view is together, in a crafty paragraph, what  
6 you are saying is you need a license to collect umbilical  
7 cord blood. If you don't, you will be sued.

8 MR. ANDRE: We are suing obstetricians, that is  
9 correct. And our theory with two new patents that are not  
10 before the Delaware Court, but these two patents are theories  
11 of infringement that have been alleged in the complaint are  
12 direct inducement and/or contributory.

13 We believe that, at the very least, we have very  
14 strong evidence of inducement to infringe.

15 Now, in a press release, I don't think we have  
16 put forward all of our legal theories.

17 In your Honor's July 2nd order, the order is very  
18 clear. It says you shall not make false or misleading  
19 statements to obstetricians.

20 THE COURT: That's true.

21 MR. ANDRE: And we have not made false or  
22 misleading statements.

23 The order states that the missing elements for  
24 contributory infringement are that you must list three  
25 elements in that order, required for contributory

1 infringement.

2 Well, at this point, we're not certain we're  
3 going to be alleging contributory infringement against these  
4 obstetricians. We have alleged the various acts of  
5 infringement and we believe we have good cases of inducement  
6 to infringe.

7 THE COURT: Mr. Andre, let me interrupt for a  
8 second. I will let you go again.

9 MR. ANDRE: Sure.

10 THE COURT: But I am troubled by the context,  
11 and as they say, the totality of the circumstances. And what  
12 I mean by that is I think I've alluded to it earlier: The  
13 June 1 letter and this release and the particular statement  
14 or paragraphs that we're talking about right now.

15 I think that you are correct: That it is my view  
16 at this stage of this discussion that PharmaStem is probably  
17 not in contempt of the Court's July 2 order. You point out  
18 that the order was directed or directed PharmaStem -- it was  
19 directed to letters to obstetricians, number one.

20 This August 2 press release is not directed in  
21 the same fashion. It's at least for that reason, and perhaps  
22 others, that it would be, I think, prudent for the Court to  
23 consider this as a motion to amend the July 2 order rather  
24 than to find PharmaStem in contempt of that order.

25 Having said that, regardless of how the motion is

1 styled, I still have the concern, Mr. Andre, that when read  
2 by the same group of physicians, you know, the same  
3 practitioners that you mailed to back in June when the 8/2  
4 release is read, when it comes in the mail or they visit the  
5 website, that it's going to have a similarly chilling effect,  
6 which I felt under the circumstances, for the reasons  
7 articulated in the order, was inappropriate.

8 I think you are probably right: That the  
9 statement that we're talking about in the 8/2 release doesn't  
10 offend or does not mislead or isn't false to the same degree  
11 that the June 1 statement did.

12 But I think that Mr. Englander is correct in  
13 that, without setting forth necessarily or revealing your  
14 theory of the case or the cases against whomever you elect to  
15 bring them, that as you put it, a more benign or a perhaps  
16 more accurate statement could have been made and perhaps can  
17 be made that would not have as a chilling effect. It's going  
18 to have a chilling effect. I've got to believe particularly  
19 large groups are going to be running to their lawyers to try  
20 to figure out whether they can collect, safely collect cord  
21 blood. And that remains an issue extant that has been, as  
22 you all know, joined before this Court and is being  
23 considered presently.

24 I understand the need for the marketplace to  
25 continue. Things do not necessarily come to a grinding halt

1 when you walk into a courtroom, but you are in litigation,  
2 all the parties on this line, and, unfortunately, perhaps, or  
3 maybe fortunately, that is a deliberate process. Maybe  
4 altogether too deliberate for all concerned here. But it is  
5 what it is, and it's going to take the time it takes.

6 My feeling is that parties on both sides should  
7 do what they can to move cautiously forward in your efforts  
8 to market your products and your services without involving  
9 the Court as, or attempting to utilize the win or the loss as  
10 an imprimatur, as a shield or a sword, in those efforts. I  
11 think it's a dangerous game you play, and you play it at your  
12 peril, both of you.

13 So I'm interested in knowing what, if anything,  
14 you can conceive among you that you can do about this release  
15 that will accommodate PharmaStem's right to announce, in good  
16 faith, the existence of lawsuits and its intent to protect  
17 its intellectual property rights while at the same time not  
18 interfering with this Court's process and interfering with  
19 the ability of potential consumers out there, obstetricians  
20 and patients, to collect cord blood in an appropriate way.

21 MR. ANDRE: Your Honor, this is Paul Andre once  
22 again.

23 THE COURT: Yes?

24 MR. ANDRE: I appreciate the Court's comments and  
25 we obviously, PharmaStem has a very large interest in the

1 continued collection of cord blood. That's how we derive our  
2 revenues, licensing.

3 THE COURT: Sure.

4 MR. ANDRE: We have, as you can see on the press  
5 release, 15 licensees, licensed the entire industry with the  
6 exception of the defendants. We want them to collect as much  
7 as possible. We want them to be very successful.

8 The defendants are saying it has a chilling  
9 effect on their business by us suing them and suing  
10 obstetricians who we believe work with them.

11 If it has a chilling effect on them, that is not  
12 necessarily relevant one way or the other, because the  
13 industry is being serviced by these 15 defendants.

14 We want the -- our licensees to be protected. In  
15 fact, we have obligations to our licensees.

16 These people are paying a royalty to us to use  
17 the technology in the patent whereas other companies who are  
18 not paying such a royalty are continuing and they're  
19 competitors. They're at a competitive disadvantage because  
20 of that.

21 So whereas -- you know, our goal is not to  
22 interfere with this Court's process. That's the reason the  
23 patents that are in this press release, that are in this  
24 lawsuit, are not the patents that are in front of the Court.  
25 This lawsuit is very distinguishable from the Court. There

1 will be new legal theories, we are doing what we can to  
2 protect our intellectual property and to protect our  
3 licensees.

4 We also, regretfully, are suing obstetricians.  
5 This is not something we want to do. We would rather not do  
6 this. But, nonetheless, we have to protect our intellectual  
7 property and we will continue doing so.

8 If it has a chill effect on the unlicensed  
9 cord bloods business, then that's an unfortunate consequence  
10 of the unlicensed cord blood banks refusing to take a  
11 license.

12 THE COURT: What about the obstetricians and  
13 patients who want to have -- who cannot have their cord blood  
14 collect as a result of, or may elect not to as a result of  
15 reading this release?

16 MR. ANDRE: I think there are, like I said, there  
17 are numerous opportunities. And that was the purpose of this  
18 release and defending the -- the letter actually informs  
19 obstetricians that they don't need to worry. They won't be  
20 sued if they use these 15 companies. And they find that  
21 offensive, and that is -- it's something that we are trying  
22 to keep the obstetricians, let them know, keep collecting,  
23 this is a good thing.

24 MR. ENGLANDER: Your Honor --

25 THE COURT: Yes?

1 MR. ENGLANDER: -- I heard what you said and I  
2 think, to some extent, you were suggesting could the parties  
3 get together and agree on something.

4 THE COURT: Yes.

5 MR. ENGLANDER: And I have some ideas on that and  
6 I would be happy to try, but my sense is perhaps that there's  
7 no receptivity on the other side. And if this letter has  
8 already gone out, I'm not sure what can be done.

9 THE COURT: Well, the letter is gone and --

10 MR. ENGLANDER: And directly to 25,000  
11 obstetricians, apparently.

12 THE COURT: Yes.

13 MR. ENGLANDER: And we know what's going to  
14 happen next. Our phones are going to start ringing.

15 And I mean we can certainly think about what we  
16 think would bring this back to neutral, if you will, because  
17 I understand that to be what the Court is saying.

18 THE COURT: Yes. That's what I am saying.

19 MR. ENGLANDER: Move forward --

20 THE COURT: That's where it needs to be. It  
21 needs to be a neutral and the parties need to recognize that  
22 you are in a litigation process that you need to have  
23 patience with.

24 I understand, Mr. Andre, that, you know, the  
25 business your client is in, but this is the American justice

1 system, and this is the way it works. And I do, quite  
2 frankly, believe that things like this, and I mean by that  
3 the 8/2 release, tend to interfere with the deliberative  
4 processes. At least I have that feeling about my deliberate  
5 process insofar as the case before me is concerned.

6 And I am not as much concerned as you seem to be  
7 focusing on the profits of the defendants. I am very much  
8 concerned about obstetricians and families being threatened  
9 in a way that's going to cause them, perhaps improperly, that  
10 has not been decided yet, to lose a once-in-a-lifetime  
11 opportunity. That's the classic definition of irreparable  
12 harm.

13 Go ahead.

14 MR. ANDRE: I agree, your Honor. It's something  
15 that we do not want to have that chill effect. We want to  
16 let obstetricians know and families, whoever reads this, that  
17 there are viable alternatives, and that they have a license.

18 THE COURT: Well, is there any -- does  
19 PharmaStem, Mr. Andre, believe that it would be possible to  
20 amend this language in a way that would satisfy the needs and  
21 concerns of all of the entities at the table, or is that just  
22 something that you don't think is worth discussing?

23 MR. ANDRE: Well, we're always open, your Honor,  
24 of course, to any kind of discussion. I don't know what -- I  
25 would have a hard time because this is a press release that,

1 like I said, was attempted to be -- not have the chill effect  
2 on the obstetrician community or the people who would want to  
3 have this once-in-a-lifetime opportunity.

4 THE COURT: Well, if both views are considered,  
5 albeit perhaps not accepted, considered for purposes, at  
6 least, of a limited period of time while the Court resolves  
7 at least in Delaware the issues before it, it may be that --  
8 there are a lot of smart people on this phone call that you  
9 can come up with with some language that would at least  
10 provide a temporary solution, if not a permanent one.

11 I'm not saying that one or the other of you would  
12 have to, collective defendants on the one hand and PharmaStem  
13 on the other, would have to necessarily accept the theory  
14 that might underlie the particular language that you are able  
15 to agree upon.

16 But I hope that the Court's concerns are going to  
17 be taken seriously. And if you are willing to talk --

18 MR. ANDRE: Your Honor, we're always willing. If  
19 Mr. Englander or any of the other defendants' counsel would  
20 prefer to, like to give us language, we would definitely  
21 consider it, and obviously if it was language we found  
22 acceptable, we'd post it on the website and put it in a press  
23 release. We have no problem with that.

24 MR. ENGLANDER: But not send it out to the 25,000  
25 people?

1 MR. ANDRE: Pardon me?

2 MR. ENGLANDER: But not send out another  
3 mailing?

4 MR. ANDRE: Well, if there's a possibility --

5 MR. ENGLANDER: That -- that may be acceptable,  
6 Paul.

7 MR. ANDRE: We're very agreeable.

8 We have to let the obstetricians know that we're  
9 not going to sue them if they use one of these 15 licensed  
10 banks. If they are using a bank that's not licensed, whether  
11 it be the defendants' --

12 THE COURT: Let's do this, Mr. Andre. Let's do  
13 this. Let give counsel an opportunity to talk.

14 MR. ANDRE: Okay.

15 THE COURT: Okay? The Court will hold this  
16 matter under advisement. The problem -- the reason, one of  
17 the reasons I wanted to get on the phone with you so quickly  
18 without, with apologies to PharmaStem, giving you the  
19 opportunity for a written response, is that I'm about to  
20 leave. Today is my last day in the office for the next  
21 couple of weeks. And, believe me, I won't be addressing  
22 PharmaStem and ViaCell.

23 MR. ANDRE: Let's hope not.

24 Your Honor, I assume I can talk to Mr. Englander,  
25 Mr. Abrams and Mr. Rodgers and any other counsel that we need

1 to talk to.

2 THE COURT: Sure.

3 MR. ANDRE: Can we assume for the purposes of  
4 this discussion that the opposition briefing to this motion  
5 is stayed --

6 THE COURT: Yes.

7 MR. ANDRE: -- until we get back with your  
8 Honor?

9 THE COURT: Yes. If you want to try to get back  
10 on the phone with me today, we might be able to do that. I  
11 don't know what your schedules are like and how much time  
12 counsel are going to be able to devote to this issue. But  
13 this would be the last opportunity you're going to have to  
14 talk with me about it for the next couple of weeks.

15 MR. ENGLANDER: Well, we'll certainly try to do  
16 that, your Honor.

17 THE COURT: Okay.

18 MR. ENGLANDER: Because I guess my suspicion is  
19 that we will have difficulty coming to agreement and we may  
20 wind up having to ask the Court to do something in the way of  
21 an order instead. And I know that's not the Court's desire  
22 and we're going to do our best to have that not happen.

23 MR. ENGLANDER: Well, it is not the Court's best  
24 wish. And, again, I want to remind you, Mr. Englander, that  
25 I am not inclined to a finding of contempt under the

1 circumstances. I may be inclined to a different type of  
2 order or request.

3 MR. ENGLANDER: Understood, your Honor.

4 THE COURT: All right, then, counsel. If you are  
5 able to reach an accord or not, you probably, either way,  
6 should get in touch with Ms. Tyre-Daley and let us know  
7 whether you can and want to get back on the phone today.  
8 Otherwise, we will be looking at this at some date in the  
9 near term.

10 MR. ENGLANDER: Thank you, your Honor.

11 THE COURT: And, Mr. Rovner, the motion to  
12 dissolve will continue to be held in its present status of  
13 abeyance. Okay?

14 MR. ROVNER: Thank you, your Honor.

15 THE COURT: All right. Take care, counsel.

16 (Counsel respond "Thank you, your Honor.")

17 (Telephone conference concluded at 12:20 p.m.)

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